APPENDIX A — DECISION OF THE LOUISIANA COURT OF APPEAL DECIDED DECEMBER 23, 1998

McKinley KELLER, Plaintiff-Appellant,
v.
Carol AYMOND, Jr., et al., Defendants-Appellees.
Michael J. Johnson, Plaintiff–Appellant,
v.
Carol Aymond, Jr., et al., Defendants-Appellees.

Nos. 98-844, 98-843.

Court of Appeal of Louisiana,
Third Circuit.

Dec. 23, 1998.

BEFORE: THIBODEAUX, DECUIR, and GREMILLION, Judges.

THIBODEAUX, Judge.

The plaintiffs in these consolidated cases, Michael J. Johnson and McKinley Keller, sued, among others, the Avoyelles Publishing Company and its publisher, Randy DeCuir, for publishing the contents of their private telephone conversations allegedly intercepted in violation of the Louisiana Electronic Surveillance Act, La.R.S. 15:1301 et seq. The trial court, finding a lack of criminal willfulness on the part of the newspaper, granted summary judgment to the defendants, and the plaintiffs filed this appeal. Following our *de novo* review of the record, we reverse the summary judgment granted below due to issues of fact and law.

I.
ISSUES

We must consider:

1) whether the trial court erred in granting summary judgment to DeCuir and Avoyelles Publishing Company due to issues of fact or law regarding the defendants' violation of the Electronic Surveillance Act, R.S. 15:1301 et sequitur;

2) whether a criminal violation of La.R.S. 15:1303 is a prerequisite to a civil action under R.S. 15:1312; and,

3) whether the Electronic Surveillance Act, La.R.S. 15:1301 et seq, violates the constitutional rights of the defendant newspapers.

II.
FACTS

These consolidated lawsuits arise in part from the alleged illegal interception and taping of various private telephone conversations between the plaintiffs, Michael J. Johnson and McKinley Keller, and others. Mr. Johnson and Mr. Keller sued the defendant, Carol Aymond, Jr., alleging that he illegally intercepted and taped their conversations, that is, without the consent of any party involved, in violation of the Electronic Surveillance Act (hereinafter "the Act") at La.R.S. 15:1301, et sequitur. Mr. Aymond then allegedly called a press conference, played the tapes, and distributed copies of the transcripts of the taped conversations to those in attendance, including various newspapers and their associated reporters. The trial court has previously held that Mr. Aymond's actions constituted a "disclosure" under the Act.

The newspapers then allegedly printed excerpts from the contents of the intercepted communications of Mr. Johnson and Mr. Keller. Accordingly, the plaintiffs sued the newspapers, including the defendants herein, the Avoyelles Publishing Company and the publisher and editor/correspondent of the Avoyelles Journal (hereafter

collectively referred to as "Avoyelles Publishing"), for publishing the contents of illegally intercepted communications, which is specifically prohibited under the Act at La.R.S. 15:1307. The plaintiffs also allege the newspaper's violation of the Act through "disclosure" and "use" of the intercepted information.

The district court previously granted an Exception of No Cause of Action filed by another defendant, Central Newspapers, which we reversed. *Johnson v. Aymond*, 97-1466 (La.App. 3 Cir. 4/1/98); 709 So.2d 1072, writ denied, 98-1181 (La.6/19/98); 720 So.2d 1214. The district court then granted a partial summary judgment in favor of Avoyelles Publishing, which we now reverse. The record does not contain a transcript of the summary judgment hearing or written reasons by the trial court explaining its granting of summary judgment in favor of Avoyelles Publishing. However, the record indicates that the trial judge followed the same reasoning articulated in its prior judgment in favor of Central Newspapers, and those written reasons are included in the record. Accordingly, it is not necessary in this case to read the hearing transcript, and we find sufficient information in the record to aid us in our decision in this case.

III.
LAW AND DISCUSSION
Standard of Review

Appellate courts review summary judgments de novo, under the same criteria that govern the district court's consideration of the appropriateness of summary judgment. *See Schroeder v. Board of Supervisors*, 591 So.2d 342 (La.1991); *Benoit v. Roche*, 94-715 (La.App. 3 Cir. 6/14/95); 657 So.2d 574. A motion for summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the

mover is entitled to judgment as a matter of law. La.Code Civ.P. art. 966.

Assignments of Error

Michael Johnson and McKinley Keller contend that the trial court erred in granting partial summary judgment to the defendants, Randy DeCuir and The Avoyelles Publishing Company, due to the existence of material issues of fact and as a matter of law. The plaintiffs further ask whether the court erred in ruling that there must be criminal willfulness by the defendant in violating R.S. 15:1303 before a civil remedy can be sought under R.S. 15:1312, and whether the court erred in holding that the Act was a violation of the defendant newspaper's First Amendment (free speech/free press) rights.

Constitutionality of La.R.S. 15:1301 et seq. Privacy Versus Access

As to the First Amendment violations, in reversing the Exception of No Cause of Action of Central Newspapers, in *Johnson v. Aymond*, 709 So.2d 1072, we held that the lower court erred in considering the constitutionality of these statutes because the issue was not properly pled and because the Attorney General was not notified of the constitutionality proceeding pursuant to La.R.S. 13:4448.

In declining its jurisdiction to hear the issue, the Louisiana Supreme Court held that the trial court never specifically rendered the Electronic Surveillance Act unconstitutional but stated that "the merits of the case and/or evidence presented at trial will decide the issue of constitutionality of La.R.S. 15:1301, et seq." *See Keller v. Aymond*, 97-2203, 97-2204 (La.11/19/97); 702 So.2d 1387. Notwithstanding, the Louisiana Supreme Court subsequently declined jurisdiction on the constitutionality issue again and transferred the appeal to this court in *Keller v. Aymond*, 98-0552, 98-0553

(La.4/23/98); 717 So.2d 1151. Moreover, there is evidence in this record that an "exception based upon unconstitutionality" was filed by the defendant, Aymond, in a prior related proceeding. While the lower court did not declare the entire statute unconstitutional so as to require the Attorney General's involvement, the trial court has twice held that once the illegally intercepted conversation was disclosed by Aymond, any restrictions upon the newspaper from reporting this disclosure would be a violation of the constitutional right of freedom of the press. Accordingly, we will now decide the constitutional issue which has been raised again by both plaintiffs and defendants in their briefs to this court.

The Electronic Surveillance Act, La.R.S. 15:1301 et sequitur, provides generally that it is unlawful to intercept, disclose, or use wire or oral communications unless authorized to do so under color of law and with the consent of at least one of the parties to the communication. Title 15 contains three sections which are pertinent to this case: section 1303, which provides specific remedies in the form of criminal fines and imprisonment for the "willful" interception, disclosure and use of the communication; section 1307, which does not specify a remedy, but prohibits publication and court use of the information; and section 1312, which provides specific civil remedies in the form of monetary damages, including attorney fees and punitive damages, against any person who intercepts, discloses or uses such information.

No Louisiana jurisprudence has interpreted the substance of the Louisiana Act. However, Louisiana's Electronic Surveillance Act was fashioned after its federal counterpart, 18 U.S.C. § 2510 et sequitur, known as Title III's Omnibus Crime Control and Safe Streets Act, and federal law is instructive in the areas where the provisional language coincides.

In the present case, two important constitutional rights conflict. The First Amendment to the United States Constitution and Article 1, Section 7 of the Louisiana Constitution protect the public's right of access to information of legitimate public interest and to a free press. The Fourth Amendment to the United States Constitution and Article 1, Section 5 of the Louisiana Constitution protect an individual's right to conversational privacy. *See Katz v. United States*, 389 U.S. 347 (1967). However, neither right is absolute; each is qualified. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (first amendment); *Berger v. New York*, 388 U.S. 41 (1967) (fourth amendment). What is required in this case is a careful balancing of the public's interest in access and of freedom of the press against the individual's privacy interests.

We find the case of *Certain Interested Individuals, John Does I-V, Who Are Employees of McDonnell Douglas Corporation v. The Pulitzer Publishing Company*, 895 F.2d 460 (U.S. 8th Cir. (Mo.) 1990), *cert denied*, 498 U.S. 880 (1990), most compelling and instructive in deciding this constitutionality issue of first instance in Louisiana. In *Pulitzer Publishing*, the newspaper sought access to FBI affidavits which were attached to applications for search warrants issued in a federal investigation. The FBI's affidavit was based in large part upon telephone conversations that had been intercepted pursuant to court-ordered wiretaps. The individuals under investigation argued that their privacy rights outweighed the public's interest in access to the information and that Title III, 18 U.S.C.A. § 2510 et seq, protected the materials from disclosure because the materials contain intercepted communications.

The federal statute authorizes wiretaps by law enforcement officers and 18 U.S.C. § 2517(2) authorizes the limited use of the contents in search warrants in order to establish probable cause to search. Other sections of the federal statute provide that properly obtained wiretap information must be sealed

but can subsequently be disclosed through testimony under oath. In finding against the newspaper, the court made it clear that the statute authorized disclosure only between agents in the performance of their duties and while giving testimony. The court in *Pulitzer Publishing* upheld the privacy rights of the intercepted individuals, and its reasoning, as follows, is particularly pertinent under the facts of this case:

> Nonetheless, disclosure to a limited audience of "professionally interested strangers" in the context of their official duties is not the equivalent to disclosure to the public. Title III does not allow public disclosure of all lawfully obtained wiretap evidence just because a few officers are privy to its contents; if this were construed to do so, much of the statute would be superfluous.... We do not agree that once wiretap information is used in search warrant affidavits, it is no longer subject to Title III's restrictions upon its use and disclosure. We do not think that Title III's restrictions can be so easily avoided. The use and disclosure of wiretap information in search warrant affidavits pursuant to 18 U.S.C. 2517(2) cannot transform the wiretap information into non-wiretap information unprotected by Title III. Acceptance of this argument would create a very large loophole in Title III.

Pulitzer Publishing, 895 F.2d at 465.

Similarly, in the present case, once the plaintiffs' communications were intercepted and used by Aymond, that initial disclosure did not transform the intercepted communications into non-intercepted communications unprotected by Louisiana's Title 15.

Moreover, the allegedly illegal nature of the interceptions in this case should entitle the plaintiffs to even greater protection than those afforded the investigated individuals in *Pulitzer Publishing*.

In balancing the public's and the newspaper's right of access against the individual's right of conversational privacy, the *Pulitzer Publishing* court stated that the absence of an indictment against the individuals was critical because where no indictments had issued against persons allegedly involved in criminal activity, there was a clear suggestion that the Government could not prove the allegations. The court stated that "The court of public opinion is not the place to seek to prove them." *Id.* at 466. The court further articulated:

> Moreover, in the absence of an indictment and a pending criminal trial, individuals whose wiretapped conversations are disclosed have no judicial forum in which they may potentially vindicate themselves or their conduct. Without an indictment, there can be no trial and, from their perspective, no acquittal. Thus, [w]here privacy interests in wiretapped conversations are asserted, the court must consider how disclosure of the information would affect the persons identified and society's interest in disclosure. A number of factors enter into this analysis, including the extent of public knowledge of the material, the accusatorial nature of the material, and the need for public scrutiny of the government operations disclosed in the material....

Id. at 467.

In the present case, the record contains no evidence that government operations were involved or that the wiretap was legally obtained by law enforcement officers during an investigation. The allegation is that the interceptions were illegally obtained by private citizens. If covert activity was suspected, a legal wiretap should have been ordered, and even that would have been afforded protection. Hence, there is no legitimate public interest to be served by the newspaper's disclosure of the private conversations of the plaintiffs in this case. The plaintiffs had an expectation of privacy in their personal conversations that is clearly protected by the Fourth

Amendment to the United States Constitution and by Article 1, Section 5 of our state constitution. Therefore, there is no question that the Electronic Surveillance Act, La.R.S. 15:1301 et seq., which merely creates a method for enforcing the Fourth Amendment's and Article 1, Section 5's protection of conversational privacy, does not unconstitutionally impinge on any freedom of the press protections.

Neither the public nor the press has a right of access to private conversations between private individuals initiated in the privacy of their respective homes. This is particularly true when intercepted individuals have not been indicted for a crime and yet stand to have their reputations and careers seriously damaged by public opinion. We find that the protections against public disclosure of allegedly illegal interceptions in La.R.S. 15:1301 et seq are not only constitutional but are even more important than the protections of legally obtained wiretaps in the federal statute.

Our courts have made it clear that the media does not have unfettered rights of access or rights to publicize the contents of any audio and visual event it so desires without the consent of the parties involved just because the First Amendment and Article 1, Section 7 protect freedom of speech and freedom of the press. In *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562 (1977), the United States Supreme Court unequivocally articulated that the First and Fourteenth Amendments of the Constitution did not immunize a television broadcasting company when it broadcasted a performer's entire act without his consent. In balancing rights, the press is subject to the same restrictions which our law imposes on the general public. Indeed, the press "is responsible for abuse of [the] freedom" given to it. La. Const., art. 1, § 7.

In *California First Amendment Coalition v. Calderon*, 97-15493 (9th Cir. (Cal.) 7/23/98); 150 F.3d 976, a coalition of press and broadcast journalists challenged the exclusion of

witnesses from certain phases of lethal injection executions. There, the prison's Procedure 770 was under attack. It prohibited the public viewing of officials escorting an inmate to the chamber, strapping him to the gurney, and inserting the IV tubes, but allowed observation beginning at the time the lethal drug was running through the IV. Procedure 770 minimized the exposure of the members of the execution team to the media or other witnesses out of concern for staff safety and institutional security. In upholding prison Procedure 770, the court articulated that the First Amendment does not protect the right of the press to gather news not available to the public.

The court's reasoning in *Calderon* is particularly germane to this case. In *Calderon*, the court stated that the right of the press to gather news and information is protected by the First Amendment in order to prevent freedom of the press from being eviscerated. However, the court made it clear that, "[a]lthough substantial, the protection is not without limits. For example, the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Calderon*, 150 F.3d at 981, citing *Branzburg v. Hayes*, 408 U.S. 665 (1972). The *Calderon* court then cited other Supreme Court cases limiting the press in its access to inmates. In all cases, the courts found that because the challenged policies did not deny the press access to sources of information available to members of the general public, those policies did not violate the First Amendment. The court expressed its agreement that executions are matters of great public importance, and that more information leads to a better informed public. It further articulated its acknowledgment that the role of the media is important and that, acting as the eyes and ears of the public, it can be a powerful and constructive force, contributing to remedial action in the conduct of public business.

However, the court poignantly observed that "the First Amendment does not protect the right of the press to gather news not available to the public" and that holding is "not predicated upon the importance or degree of interest in the matter reported." Succinctly stated, the press has no First Amendment right of access greater than that of the public. *Id.* at 982. Similarly, in the present case, the public at large has no right of access to private telephone conversations between individual citizens, and the Louisiana Electronic Surveillance Act further prohibits such access through interception, use and disclosure. Accordingly, those prohibitions are constitutional and are extended to the press. The press cannot escape the prohibitions of the Louisiana Electronic Surveillance Act under the guise of constitutional protection. We find that La.R.S. 15:1301 et seq should be stringently enforced and construed against the violator of any of its sections pursuant to a literal interpretation of the statute as set forth more fully below.

Criminality Is Not Required Under All Sections of The Louisiana Act

The trial court determined that, because an Assistant Attorney General stated in a prior proceeding that he "felt there was no way" to find criminal behavior on the part of the newspapers in printing the contents of the audiotapes, there could also be no civil remedy against Avoyelles Publishing. We disagree. We find that the statutes address criminal and civil violators and provide for criminal and civil penalties. We further find that the illegal interceptor is a criminal violator and is also subject to civil penalties, while the secondary user of the information may be liable criminally and civilly or only civilly depending upon the circumstances surrounding his use of the information. Accordingly, we find that the trial court erred in holding that criminal willfulness must exist on the part of the defendant newspaper before the plaintiffs can claim a civil remedy under La.R.S. 15:1312. Hence, the newspaper can be held civilly liable for publishing

the contents of the taped conversation, even if it was not charged in a criminal proceeding or even if the elements of criminal willfulness are lacking.

As stated, Louisiana's Electronic Surveillance Act was fashioned after its federal counterpart, 18 U.S.C. § 2510 et sequitur. However, it is important to note that Louisiana did not adopt many of the provisions of the federal act, and the language varies significantly between the two acts, as do the penalties mandated by each. Therefore, while the defendant newspaper seeks to analogize federal cases interpreting the federal act, we must compare the pertinent language in the applicable provisions before taking instruction from federal cases.

La.R.S. 15:1303 And Federal Statute 18 U.S.C. § 2511

Generally, La.R.S. 15:1303 provides that it is unlawful to willfully intercept a wire or oral communication without color of law and the consent of one of the parties to the communication; and it is illegal to willfully disclose or use the contents of the communication if there is reason to know that it was illegally obtained. Section 1303 does provide for criminal penalties up to $10,000 and imprisonment between two and ten years at hard labor. More specifically, section 1303 provides in pertinent part:

> Section 1303. Interception and disclosure of wire, electronic, or oral communications:
> A. Except as otherwise specifically provided in this Chapter, it shall be unlawful for any person to:
> (1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire or oral communication;
> (2) Willfully use, endeavor to use, or procure any other person to use or endeavor to use, any electronic, mechanical, or other device to intercept any oral communication ...

(3) Willfully disclose, or endeavor to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection ; or
(4) Willfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection.
B. Any person who violates the provisions of this Section shall be fined not more than ten thousand dollars and imprisoned for not less than two years nor more than ten years at hard labor, without benefit of probation, parole, or suspension of sentence. (Emphasis added)

Therefore, section 1303 of Louisiana's Electronic Surveillance Act does provide for criminal penalties and imprisonment, but only for violations under "this Section," that is section 1303. The District Attorney's office has not filed criminal charges in this matter. It is clear from the record that the trial court based its dismissals of the civil suits against Central Newspapers, Inc., and of Avoyelles Publishing on its finding of a lack of criminal intent. More specifically, in the trial court's "Reasons for Ruling" wherein it granted the Exception of No Cause of Action filed by Central Newspapers, the court referenced a prior proceeding, "In Re: A Matter Under Investigation." There, the trial court took cognizance of statements made by a Louisiana Assistant Attorney General indicating that he "felt there was no way" that the State of Louisiana could establish criminal intent on the part of any of the newspapers.

Again, in its Judgment denying the State's Motion to Compel and the Bunkie newspaper's Motion to Quash, the trial court articulated that the "publication of information disclosed at the press conferences" was "not a disclosure as described in Louisiana Revised Statute 15:1303(A)(3)."

Hence, it is clear from the court's two prior judgments that it found no criminal disclosure by the newspapers, and used that as a basis for dismissing civil liability claims against them. However, the trial court erred in interpreting the law when it found that all sections of the Act required criminal intent.

Since no Louisiana jurisprudence interprets the Louisiana Act, the defendants cite only federal cases interpreting 18 U.S.C. § 2510 et seq. More particularly, the federal counterpart of La.R.S. 15:1303 above is 18 U.S.C. § 2511, which prohibits the "intentional" interception, disclosure and use of private conversations except by law enforcement officers pursuant to court orders.[1]

The federal statute, 18 U.S.C. § 2511, provides for civil fines of $500 in some instances or imprisonment of up to five years, or both; while the Louisiana statute provides for a fine up to $10,000 and imprisonment of not less than two years and up to ten years. Moreover, the federal statute provides for various levels of offenses, while the Louisiana statute does not. The Louisiana statute carries more stringent penalties and is broader, as more fully explained below. As stated, we find that the Louisiana statute, while it may follow some provisions of the federal statute, is not an adoption of the federal statute. Federal jurisprudence is not controlling but is instructive in certain limited circumstances.

In our previous decision, without determining specifically whether a criminal violation was required, we reversed the Exception of No Cause of Action granted to Central Newspapers, finding that the plaintiffs had stated a cause of action "under the literal language of the Electronic

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[1] The federal statute, section 2511, uses the word "intentionally" rather than "willfully," as seen in Louisiana section 1303, due to the United States Congressional amendment to 2511 in 1986, substituting the word "intentionally" wherever the word "willfully" had been used.

Surveillance Act." *Johnson v Aymond*, 709 So.2d at 1075. At the present time, in reversing the summary judgment granted to Avoyelles Publishing, we specifically hold for the following reasons that criminal intent is not a requirement under all sections of the Louisiana Electronic Surveillance Act and that, as a matter of law, the defendants may be held liable under the Act. More specifically, neither La.R.S. 15:1312 nor La.R.S. 15:1307 requires criminal intent or provides for criminal penalties or imprisonment. Further, section 1307 specifies that "broadcasting" and "publishing" the contents of intercepted communications is prohibited.

La.R.S. 15:1307 Prohibits Use for Broadcasting and Publishing; Federal Statute, 18 U.S.C. § 2515 Does Not

Louisiana Revised Statute 15:1307 provides that the contents of illegally intercepted communications cannot be used as evidence in a court or legislative proceeding and cannot be broadcasted or published. This section, however, does not provide for a specific remedy when the section is violated. Section 1307 provides in pertinent part:

> 1307. Prohibition of use as evidence or intercepted wire or oral communications
> A. Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this Chapter.
> B. No person may broadcast, publish, disseminate, or otherwise distribute any part of the content of an electronic communication intercepted in violation of the provisions of this Chapter unless such dissemination or distribution is made to an investigator or law enforcement officer

conducting an investigation into a violation of the provisions of this Section.

The words "willful" and "intentional" do not appear in section 1307. Hence, there are no criminal elements necessary for a violation of the Act under section 1307, which prohibits the uses of illegally intercepted conversations in court or legislative proceedings and in broadcasts or publications. The federal statute on the other hand, 18 U.S.C. § 2515, does not contain subsection B's prohibition against broadcasting or publishing the contents of an intercepted conversation. The federal counterpart provides only:

18 U.S.C. 2515. Prohibition of use as evidence of intercepted wire or oral communications
Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

The federal statute's omission and Louisiana's inclusion of a specific prohibition against broadcasting and publishing illegally intercepted information indicates that the Louisiana legislators anticipated a separate and distinct use of intercepted information not contemplated by the federal statute.

The courts have indicated that these second "uses" of illegally obtained information are prohibited to all, lest the intended protection of our privacy rights have no effect and the statutory proscription of such disclosures are rendered impotent for their intended purpose. In *Gelbard v. United States*, 408 U.S. 41 (1972), the United States Supreme Court

exhaustively reviewed the legislative history of the federal counterpart of Louisiana's section 1307 and concluded that "the protection of privacy was an overriding congressional concern" when it enacted the federal statute, and that 18 U.S.C. § 2515's "importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear." *Gelbard*, 408 U.S. at 50.

The *Gelbard* Court reversed contempt findings against witnesses who refused to testify in court to the contents of intercepted conversations. The Court recognized that an invasion of privacy does not end when an interception occurs, but is compounded by disclosures in court or elsewhere. The Court reasoned that the testimony of witnesses compounds the statutorily proscribed invasion of privacy by adding to the injury of the interception the insult of disclosure. Similarly, in the present case, the impact of this second invasion of privacy by Avoyelles Publishing is not lessened by the circumstances that the disclosing party is merely the recipient of a communication illegally intercepted by an allegedly guilty interceptor.

The *Gelbard* Court made it clear that Title III makes illegal not only unauthorized interceptions but also the disclosure and use of information obtained through such interceptions. Otherwise, the witness becomes the victim, once again, of a federal crime. *Gelbard* went on to articulate that even the prosecutor who pursues unchecked a course of conduct involving the use of intercepted communications can subject himself to "heavy civil and criminal penalties." *Id.* at 52. In Louisiana, prosecutors, attorneys, courts, newspapers, and entities "disclosing" and "using" illegally intercepted information under La.R.S. 15:1303 are all subject to criminal penalties and imprisonment if they disclose or use the information knowing or having reason to know that it was illegally obtained. However, we also find that these "second users" can be liable for civil penalties under section 1312 without the imprisonment mandated in section 1303. Again,

Louisiana's inclusion of a particular violation for broadcasting and publishing this information in a section that does not mandate imprisonment or use the terminology associated with criminal intent, distinguishes the Louisiana statutes from the federal statutes and cases interpreting them.

A literal reading of the statute is mandated by La.Civ.Code art. 9, which instructs that when the law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature. We find that the Louisiana statute is clear and unambiguous, and susceptible of a literal interpretation.

Both plaintiffs have alleged use and publication by the defendant of intercepted communications and have submitted affidavits that they never gave authority or consent for any communication between them to be intercepted, taped, disseminated or published, or used in any way. The defendants, however, have not submitted any rebuttal evidence and in fact have not denied that the contents of the communications were published; instead, publication is impliedly conceded. On the face of section 1307, and under a literal interpretation of that section, the plaintiffs need do no more than prove publication in order to prevail at trial against the defendant newspapers for a violation of section 1307 B.

While summary judgments are now favored to secure a just and speedy determination of actions, pursuant to the 1996 amendment to La.Code Civ.P. art. 966, the burden of proof has not changed. The initial burden is still on the mover, who must show that there is no genuine issue as to material fact and that the mover is entitled to summary judgment as a matter of law. Only after the mover has met its initial burden of production must the opposition submit evidence showing the existence of specific facts establishing a genuine issue of material fact effectively shifting the burden of production to the non-moving party. *Pellerin v. Thibodeaux*, 98-181 (La.App.

3 Cir. 6/17/98); 716 So.2d 131. We find that Avoyelles Publishing has not met its initial burden and is not entitled to summary judgment.

La.R.S. 15:1312 Provides for Civil Damages Without Criminal Willfulness;
Federal Statute, 18 U.S.C. § 2520, Requires Intent

Louisiana Revised Statutes 15:1312 provides no criteria for criminal "willfulness" but only provides for recovery of civil damages, including attorney fees and punitive damages, to persons whose communications have been intercepted without consent of either party. More specifically, Louisiana's section 1312 provides in pertinent part:

> 1312. Recovery of civil damages authorized
> A. Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this Chapter shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and be entitled to recover from any such person:
> (1) Actual damages, but not less than liquidated damages computed at the rate of one hundred dollars a day for each day of violation or one thousand dollars, whichever is greater.
> (2) A reasonable attorney's fee and other litigation costs reasonably incurred.
> (3) Punitive damages.
> B. A good faith reliance on a court order shall constitute a complete defense to any civil or criminal action brought under this Chapter.

The defendants cite *Malouche v. JH Management Co., Inc.*, 839 F.2d 1024 (4th Cir. 1988), which held that civil liability for unlawful wiretapping under the federal counterpart to Louisiana section 1312, which is 18 U.S.C. § 2520, required proof of criminal willfulness. *Malouche* found that the plaintiff

had only "very slight" evidence supporting the factual allegations that his office phone was tapped by the defendant, no evidence as to who installed the device or why, and no evidence that the defendant had knowledge or criminal willfulness under pre-1986 federal statute 18 U.S.C. § 2511. In the present case, the alleged interceptor called a press conference, played the tapes, and handed out hard-copy transcriptions of the tapes. Hence, *Malouche* is distinguishable where it involved only the alleged criminal interceptor, and did not involve the mere "user" of the previously intercepted information.

Moreover, neither *Malouche* nor 18 U.S.C. § 2520 is controlling in this case, where the language of the federal statute, section 2520, is different from the language of the Louisiana statute. More specifically, the federal statute provides in pertinent part:

> 18 U.S.C. 2520. Recovery of civil damages authorized
> (a) In general.–Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate....

while the Louisiana statute, as previously indicated, provides

> 1312. Recovery of civil damages authorized
> A. Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this Chapter shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and be entitled to recover from any such person ...

Hence, while the federal statute requires an "intentional use," the Louisiana statute does not include the word "intentional" or "willful" in any part of section 1312 providing for civil remedy, but only requires "use." Moreover, federal section 2520 provides that the intercepted party may obtain a civil recovery from "the person" who engaged in the violation, indicating that a civil recovery may be available against the same party who unlawfully intercepted the conversation. As stated, the federal statute does not contain a separately proscribed violation for "publishing" contents illegally obtained by another, while in Louisiana, the publisher and the interceptor can clearly be different parties. This is supported by the language in Louisiana's section 1312 providing that the aggrieved party shall have a civil remedy against "any" person who intercepts or discloses, or uses, the communication, not just "the" person who engaged in the interception.

There exists no Louisiana jurisprudence defining "disclosure" and "use" of the contents of intercepted information under section 1312. Webster's Ninth New Collegiate Dictionary defines disclosure as "exposure," "the act of disclosing;" and defines "disclose" as "to expose to view," "to make known or public." There is no requirement in sections 1303, 1307, or 1312 that the disclosure or use of the contents of the illegally obtained communication must be a first or initial disclosure. In this court's view, there is no tenable argument that would convince this court that a newspaper publication does not make information "known or public." Any argument that attempts to show that a newspaper publication does not disclose or expose information to view is not grounded in logic.

The record indicates that this newspaper defendant disclosed the contents of the subject communications to the public at large, even though its disclosures were secondary to the alleged initial disclosure by Aymond to the press. Likewise, when the newspapers took the information and printed it, they did not merely report allegations made at a recent press

conference based upon taped conversations between the plaintiffs; they "used" the contents to sell papers, to solicit advertisements, and for any other uses a paper makes of the information it gathers. Hence, the press's publication of the intercepted information is a "use" and a "disclosure" under sections 1307 and 1312.

Therefore, under a literal interpretation of the Louisiana statute, sections 1307 and 1312, the plaintiffs, Keller and Johnson, may have civil remedies available to them against the newspapers for publishing the contents of their conversation without the necessity of a finding of criminality leading to imprisonment under section 1303. The civil damages under section 1312 are clear and unambiguous, and include actual damages, reasonable attorney fees, and punitive damages. Accordingly, we find that as a matter of law, Avoyelles Publishing is not entitled to summary judgment under sections 1307 and 1312 where criminal willfulness is not required.

As to the "willful" use and disclosure under section 1303 resulting in criminal penalties and imprisonment, the plaintiffs in their Oppositions to the Avoyelles Publishing's Motion for Summary Judgment, attempt to show that the newspaper willfully and intentionally used the information in violation of section 1303. The word willful often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. It may generally mean in a criminal statute that the act was done with a bad purpose; without a justifiable excuse; or stubbornly, obstinately, or perversely. However, "willfully" is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act. *See United States v. Murdock*, 290 U.S. 389 (1933).

The plaintiffs have filed into the record an affidavit attesting that one reporter involved thought that the communications

handed out at the press conference were illegally intercepted. Such evidence creates an issue of fact as to the knowledge of the newspaper. Even without evidence of certain knowledge, the circumstances themselves create issues of fact wherein it seems that any reporter handed an audiotape and transcript of a private conversation between parties not in attendance would have "reason to know" that the communications were obtained without consent. Accordingly, summary judgment in favor of Avoyelles Publishing under section 1303 is not appropriate.

IV.
CONCLUSION

Accordingly, we reverse the summary judgment granted by the trial court to Avoyelles Publishing, and we find that as a matter of law, criminal willfulness is not a requirement for civil damages under La.R.S. 15:1312 for "secondary" disclosures and publication of previously intercepted communications under La.R.S. 15:1307. We also find that issues of fact exist regarding the newspaper's "willfulness" of conduct, and its "knowledge" or "reason to know" that the information it published was illegally obtained, precluding summary judgment under La. R.S. 15:1303. Finally, we find that La.R.S. 15:1301 et sequitur violates neither the federal nor state constitutional guarantee of freedom of the press.

We remand for further proceedings.

All costs shall be cast against the defendants-appellees.

REVERSED AND REMANDED.

APPENDIX B — STATE TRIAL COURT'S REASONS FOR RULING DATED AUGUST 12, 1997

CIVIL SUIT NUMBER 96-3590-B

MICHAEL J. JOHNSON

VERSUS

CAROL AYMOND, JR., ET AL

12TH JUDICIAL DISTRICT COURT
PARISH OF AVOYELLES
STATE OF LOUISIANA

REASONS FOR RULING

This cause came up for hearing on July 18, 1997 on preemptory Exceptions of No Cause of Action filed by Central Newspapers, Inc.

1. BACKGROUND:

The two separate petitions filed by the two separate plaintiffs contain the following allegations against Central Newspapers, Inc.

1) Paragraph Six of the petition states that on November 7, 1996 Central Newspapers, Inc. did illegally publish and/or use the contents of illegally intercepted wire or oral communications by printing a news article, written by its reporter, Steve Banister, containing quotes from the illegally intercepted communications.

2) Paragraph Ten alleges that all of the defendants have violated R. S. 15: 1303A(4) and R. S. 15: 1307.

3) Paragraph Twelve alleges that Central Newspapers, Inc. acted with malice by publishing the contents of an illegally intercepted communication. (The Johnson lawsuit also includes a claim against Central Newspapers, Inc. for refusal to accept paid political advertisements in September of 1996 from plaintiff, Michael Johnson. This claim has been dismissed with prejudice by Michael Johnson pursuant to oral Motion made on July 18, 1997).

The question presented to this court is whether or not the law affords a remedy to plaintiff based on the facts as alleged to plaintiffs in their petitions. The Court is to review the petition and accept all well plead facts as true.

Exceptor contends that R. S. 15:1301, et. seq., (the Louisiana Electronic Surveillance Act), makes it unlawful to disclose the contents of wire or oral communications but does not bar the publication or broadcast of an illegally taped telephoned conversation after that conversation has already been disclosed by another party. Exceptor contends that as long as the reporter or publisher does not cooperate with the perpetrator of the crime, then the act of repeating the disclosure by publishing or broadcasting should not be deemed a violation of the statute.

Plaintiffs have filed Memorandum in Opposition to the Peremptory Exception of No Cause of Action. Plaintiffs contend that they have the full right to expect privacy in their home. Plaintiffs contend that if this Court is correct in a previous ruling, then once the disclosure has been made, illegally taped conversations would be played at news conferences, published in newspapers and broadcasts, and therefore, R. S. 15:1301, et. seq. would be meaningless.

Plaintiffs contend that all the disseminator would need to do to avoid application of R. S. 15:1301, et. seq. is to state that he received the tape anonymously.

Plaintiffs contend that R. S. 15:1307(B) is applicable to the claims against Central Newspapers, Inc. R. S. 15:1307(B) prohibits any person from publishing or disseminating or otherwise distributing any part of the content of an electronic communication intercepted in violation of the Louisiana Electronic Surveillance Act unless the dissemination or distribution is made to a law enforcement officer. Plaintiffs also contend that R. S. 15:3030A(4) is applicable to the claims against Central Newspapers, Inc. R. S. 15:1303A(4) prohibits any person to willfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained in violation of the Louisiana Electronics Surveillance Act.

Plaintiff have also urged the court to reconsider its prior ruling wherein plaintiffs claim that this Court held that "Carol Aymond's dissemination of an illegally taped conversation was legal and protected by statutory provisions". Plaintiffs also contend that the only inquiry is whether the State of Louisiana has the constitutional authority to restrict the press by prohibiting the media from publishing or broadcasting the contents of an illegally intercepted conversation. Plaintiffs contend that the newspaper was not prohibited from printing the fact that there was a press conference and that fact that there were tapes and allegations of possible wrong doing being discussed on the tapes. However, plaintiffs allege that it serves the public no good to go into the specifics of the tapes.

In argument, plaintiffs contend that the Petition states a cause of action pursuant to the literal reading of R. S. 15:1307(B) and 1303A(4). Plaintiffs contend that their Petition against Central Newspapers, Inc. should be dismissed only in the event that the Court finds portions of the statute to be unconstitutional. Plaintiffs allege that this statute is totally constitutional.

In argument, Central Newspapers, Inc. contends that their publication of the contents of the news conference of November 6, 1996 and their publication of the contents of the taped conversation allegedly between Michael Johnson and McKinley Keller is not a violation of Louisiana Electronic Surveillance Act.

The court allowed Central Newspapers, Inc. one week within which to submit further Memorandum with specific instruction that Memorandum should be issued concerning the criminality versus civility of the Louisiana Electronic Surveillance Act, and further granted to plaintiffs one week thereafter to respond. Memorandum have been received from Central Newspapers, Inc. and from both plaintiffs.

II. DISCUSSION OF PRIOR RULINGS:

The Laws relating to electronic surveillance were originally enacted by the legislature in 1980. The provisions of the act establishing laws relative to electronic surveillance provided that the act would expire on July 1, 1984. The legislature thereafter, in 1985, re-enacted legislation regulating electronic surveillance with an effective date of July 23, 1985. The purpose of the act was to provide definitions, procedures, terms, conditions, and effects of certain electronic surveillance and provide definitions and penalties, and to provide certain civil remedies for violation of the act, and to provide for related matters. (Acts, 1985 No. 859)

R. S. 15:1303 is a criminal statute. It provides that "it shall be unlawful for any person to..." R. S. 15:1307 prohibits the use of intercepted communications in evidence and/or prohibits use via broadcast, publication, dissemination or otherwise. R. S. 15:1312 provides a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose or use such communications (intercepted communications).

On May 7, 1997 in a proceeding in this Court entitled "In Re: A Matter Under Investigation", this Court took cognizance of statements made by the Assistant Attorney General of the State of Louisiana indicating that he felt there was no way that the State of Louisiana could establish any criminal intent on the part of any of the newspapers and that in his opinion, the newspaper did not violate R. S. 15:1301, et. seq. in any fashion. This Court also considered Memorandum and argument. The newspapers contended in their argument that the act of publishing after someone had already disclosed is not itself a violation of the statute. The newspapers contended that since someone else had completed the crime by disclosing, that for a newspaper to then take that public information and publish it is not to disclose.

Quoting from this Court's opinion in that hearing, this Court stated that

> "without question, in my mind, what these newspapers and television stations were doing, were merely reporting news. It was definitely news worthy. Without question, the definition of disclosure is to expose or make known. The information which was reported was exposed or made known at the press conference. It was not exposed or made known by the newspapers of the televisions stations".

This Court further stated that

> "it had already been disclosed. Certainly, once it is disclosed, if you tell the newspaper or television station that they cannot report it, you are definitely violating their constitutional rights".

The specific holding of the Court was that the publication of the information disclosed at the two press conferences was not in violation of R. S. 15:1301, et. seq., based on the prior

disclosure. The information published in the newspapers was disclosed or made known by a person other than the newspaper reporters at a press conference and once disclosure was made, this Court held that the newspapers had a constitutional right and constitution protection to report the information that was divulged and disclosed at the press conference by someone else.

In this proceeding, this Court issued Written Reasons for Judgment on May 20, 1997 concerning an Exception of Unconstitutionality as filed by Carol Aymond. The specific ruling of this Court was as follows:

a) Persons do have the right to expect privacy.

b) R. S. 15:1301, et. seq. is constitutional in that it makes it unlawful for any person to intercept a wire communication without proper authorization, and therefore it stands to reason that it should be unlawful for any person to wilfully disclose the contents of the illegally intercepted communication.

c) The criminal penalty provisions were cruel and unusual and this provision of the statute is unconstitutional.

d) If a person happens upon tapes of conversations between public officials, and if these tapes contain discussion of illegal activity, then disclosure is proper and R. S. 15:1301 et. seq. is unconstitutional as it would apply to that situation.

e) This Court HAS NOT issued an opinion that Carol Aymond's alleged dissemination of the taped conversation between plaintiffs was legal. This Court has held that if the conversations between two public officials discusses illegal activity, then that disclosure is protected. The merits will decide that issue.

All parties agree that on November 6, 1996 Carol Aymond played a tape of a telephone conversation allegedly between Michael Johnson and McKinley Keller. This was done at a news conference at the law office of Carol Aymond allegedly attended by a handful of people, including the news media. Carol Aymond is an attorney. This Court has previously held that this was a disclosure as contemplated by R. S. 15:1301, et. seq. This Court has previously held that once this information was disclosed, any restrictions upon the newspaper from reporting this disclosure would be a violation of the constitutional right of freedom of press. After consideration of all Memorandum and much thought and deliberation, this Court is convinced more than ever that the prior holding was and is correct.

III. RULING:

The petition filed by plaintiffs does state a cause of action based on a literal reading of the Electronic Surveillance Act, however, for two separate reasons the Exception filed by Central Newspapers, Inc. is proper and with full merit. These reasons are as follows:

1) Central Newspapers, Inc. published information which had already been disclosed. Central Newspapers, Inc. is not alleged to have intercepted the conversation nor aid the perpetrator. They did not violate the statute, therefore, there can be no civil cause of action.

2) Once the contents of the alleged illegally intercepted conversation was disclosed, prohibiting the newspapers from reporting this news would violate their constitutional rights.

Accordingly, the Peremptory Exception of No Cause of Action as filed by Central Newspapers, Inc. be and is hereby GRANTED.

Counsel for Central Newspapers, Inc. is to prepare formal Judgment to include the dismissal by plaintiff, Michael Johnson, of the claim for damages based on the allegation that Central Newspapers, Inc. failed to accept a paid political advertisement.

Marksville, this 12th day of August, 1997

WILLIAM J. BENNETT
12TH JUDICIAL DISTRICT COURT,
JUDGE
DIVISION B

APPENDIX C — LOUISIANA SUPREME COURT'S DENIAL OF CNI'S APPLICATION FOR WRIT OF CERTIORARI DECIDED APRIL 1, 1999

McKinley KELLER

v.

Carol AYMOND, Jr., et al, Consolidated with Michael J. Johnson,

v.

Carol AYMOND, Jr., et al.

No. 99-C-0199.

Supreme Court of Louisiana.

April 1, 1999.

IN RE: Central Newspaper Inc.;–Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of Avoyelles 12th Judicial District Court Div. "B" Number 96-3590, 96-3663; to the Court of Appeal, Third Circuit, Number CA98-0844

Denied.

BJJ
WFM
CDK
CDT

CALOGERO, C.J., would grant the writ.
LEMMON, J. would grant the writ.
VICTORY, J. would grant the writ.
KNOLL, J. not on panel; recused.

APPENDIX D — LOUISIANA SUPREME COURT'S DENIAL OF AVOYELLES PUBLISHING COMPANY'S APPLICATION FOR WRIT OF CERTIORARI DECIDED APRIL 1, 1999

McKinley KELLER

v.

Carol AYMOND, Jr., et al, Consolidated with Michael J. Johnson

v.

Carol AYMOND, Jr., et al.

No. 99-C-0219.

Supreme Court of Louisiana.

April 1, 1999.

IN RE: Avoyelles Publishing Co.; Decuir, Randy;–Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CA98-0843, CA98-0844; Parish of Avoyelles 12th Judicial District Court Div. "B" Number 96-3590, 97-3663

Denied.

BJJ
WFM
CDK
CDT

CALOGERO, C.J., would grant the writ.
LEMMON, J. would grant the writ.
VICTORY, J. would grant the writ.
KNOLL, J. not on panel; recused.

APPENDIX E — DECISION OF THE LOUISIANA COURT OF APPEAL DECIDED APRIL 1, 1998

Michael J. JOHNSON, Plaintiff-Appellant,
v.
Carol AYMOND, Jr., et al., Defendant-Appellee.

No. 97-1466.

Court of Appeal of Louisiana,
Third Circuit.

April 1, 1998.

Before THIBODEAUX, COOKS and AMY, JJ.

AMY, Judge.

Plaintiffs[1] appeal the trial court's grant of an exception of no cause of action filed by Central Newspapers, Inc. We reverse.

DISCUSSION OF THE RECORD

Both McKinley Keller and Michael Johnson filed a petition for damages against several defendants, including Central Newspapers, Inc., for damages allegedly sustained by the publication and/or dissemination of the contents of an allegedly illegally intercepted communication between Keller

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[1] This case was consolidated with Keller v. Aymond, 97-1467 (La.App. 3 Cir. 4/1/98); 709 So.2d 1076. The plaintiff in the present case, 97-1466, is Michael J. Johnson. The plaintiff in the companion case, 97-1467, is McKinley Keller. We discuss both cases in this opinion.

and Johnson. Plaintiffs suits have been consolidated on appeal.

According to the allegations of those lawsuits, Carol Aymond, Jr., one of the named defendants, allegedly recorded a telephone conversation between Keller and Johnson, as well as a conversation between Keller and several other public officials. On November 6, 1997, Aymond called a press conference at which he distributed a purported transcript of the Keller/Johnson conversation to reporters and spectators. The following day, November 7, 1997, Aymond mailed a copy of the conversation to the special counsel to the Louisiana Judiciary Commission. It is further alleged that over the next few days, various news articles were published containing excerpts from the communication between Keller and Johnson which was alleged to have been illegally intercepted. These news articles are the focus of concern for the plaintiffs who have brought suit against the remaining defendants, including Central Newspapers, Inc. Further, according to the allegations, a second press conference was held on November 13, 1997 at Aymond's office, during which a transcript of the conversation between Keller and the other public officials was distributed. From the record, it appears that the contents of this second transcript were never reproduced by the media.

Central Newspapers, Inc. filed a peremptory exception of no cause of action contending that "the Electronic Surveillance Act [La.R.S. 15:1301, et seq.][2] does not bar the publication or

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[2] The relevant provisions of the Electronic Surveillance Act are La.R.S. 15:1303, La.R.S. 15:1307, and La.R.S. 15:1312. La.R.S. 15:1303 provides in pertinent part:
A. Except as otherwise specifically provided in this Chapter, it shall be unlawful for any person to:

* * * * * *

broadcast of an allegedly illegally intercepted telephone conversation after that conversation has already been disclosed...."

The trial judge, in his reasons for ruling, stated:

III. RULING:

The petition filed by plaintiffs does state a cause of action based on a literal reading of the Electronic Surveillance Act, however, for two separate reasons the Exception filed by

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(4) Willfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection.
La.R.S. 15:1307 provides in pertinent part:
B. No person may broadcast, publish, disseminate, or otherwise distribute any part of the content of an electronic communication intercepted in violation of the provisions of this Chapter unless such dissemination or distribution is made to an investigator or law enforcement officer conducting an investigation into a violation of the provisions of this Section.
La.R.S. 15:1312 provides in pertinent part:
A. Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this Chapter shall have a civil cause of action against any person who intercepts, discloses or uses, ... such communications, and be entitled to recover from any such person:
(1) Actual damages....
(2) A reasonable attorney's fee and other litigation costs reasonably incurred.
(3) Punitive damages.

Central Newspapers, Inc. is proper and with full merit. These reasons are as follows:

1) Central Newspapers, Inc. published information which had already been disclosed. Central Newspapers, Inc. is not alleged to have intercepted the conversation nor aid the perpetrator. They did not violate the statute, therefore, there can be no civil cause of action.

2) Once the contents of the alleged illegally intercepted conversation was disclosed, prohibiting the newspapers from reporting this news would violate their constitutional rights.

Accordingly, the Peremptory Exception of No Cause of Action as filed by Central Newspapers, Inc. be and is hereby GRANTED.

Plaintiffs appeal, assigning the following trial court errors: (1) trial court erred in dismissing their claims against Central Newspapers, Inc. after finding that the literal interpretation of the Electronic Surveillance Act does support a cause of action; and (2) the trial court erred in finding that to apply the Electronic Surveillance Act in this case would be unconstitutional.

MERITS

First, we address the trial court's ruling which essentially declared the Electronic Surveillance Act unconstitutional as applied to the actions of Central Newspapers, Inc. It is unclear from the limited record lodged in this appeal whether the trial court considered on its own motion the constitutionality of the Electronic Surveillance Act as it applied to this defendant or whether said consideration was a result of language contained in plaintiffs' memorandum in opposition to defendant's exception.[3] Regardless, we find

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[3] In written reasons for judgment, the trial judge refers to a memorandum in opposition filed by the plaintiffs and that memorandum has been attached by the plaintiffs to their

that consideration of the constitutionality of the Electronic Surveillance Act by the trial court was error.

The Louisiana Supreme Court, in the case of *Vallo v. Gayle Oil Co., Inc.*, 94-1238, p. 8 (La.11/30/94); 646 So.2d 859, 864-65, stated:

> Our Code of Civil Procedure does not require a single procedure or type of proceeding for challenging or assailing the constitutionality of a statute. However, the long-standing jurisprudential rule of law is: a statute must first be questioned in the trial court, not the appellate courts, and the unconstitutionality of a statute must be specially pleaded and the grounds for the claim particularized. [Citations omitted].
>
> The pleadings allowed in civil actions are petitions, exceptions, written motions and answers. LSA-C.C.P. art. 852. Therefore, when the unconstitutionality of a statute is specifically pled, the claim must be raised in a petition (the original petition, an amended and supplemental petition or a petition in an incidental demand), an exception, a motion or an answer. It cannot be raised in a memorandum, opposition or brief as those documents do not constitute pleadings.

(Emphasis added).

Further, when considering the constitutionality of a statute, the supreme court, exercising the policy of judicial self-restraint, recognizes the general presumption of a

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appellate briefs. However, the memorandum does not likewise appear in the record presented to this court for review. Accordingly, plaintiffs' memorandum provided to the trial court but not filed in the record is not part of the record on appeal and will not be considered. *Stacks v. Mayflower Transit, Inc.*, 95-693 (La.App. 3 Cir. 11/2/95); 664 So.2d 566; *Tranum v. Hebert*, 581 So.2d 1023 (La.App. 1 Cir.), *writ denied*, 584 So.2d 1169 (La.1991).

statute's constitutionality. *Brown v. State, Dep't of Pub. Safety & Corrections*, 96-2204 (La.10/15/96); 680 So.2d 1179. The attacker to the statute's constitutionality bears the burden of proving specific constitutional infirmities. *Id.* The only time a court has the authority to raise the issue of the constitutionality of a statute on its own motion is "when that statute interferes with or curtails the plenary power vested in the court by the state constitution." *City of Baton Rouge, v. Stauffer Chem. Co.*, 500 So.2d 397, 400 n. 7 (La.1987); *see also Vaughn v. State, Dep't of Pub. Safety & Corrections*, 566 So.2d 1021 (La.App. 3 Cir.1990). Additionally, once the constitutionality of a statute is questioned, the attorney general must be notified by certified mail of the proceeding and, at his discretion, shall be allowed to represent the interest of the state. La.R.S. 13:4448. Because none of these procedures were observed, and the statute does not interfere with or curtail the plenary powers vested in the trial court by our constitution, the issue of constitutionality was not in proper posture for consideration.

Next, we consider the merits of Central Newspapers, Inc.'s exception of no cause of action. An appellate court, when measuring the legal sufficiency of a petition to state a cause of action, must ascertain, by looking only to the face of the petition, whether there are sufficient facts alleged to establish a case cognizable at law. *See Craft v. Allstate Ins. Co.*, 95-160 (La.App. 3 Cir. 8/30/95); 663 So.2d 116, *writ denied*, 95-2403 (La.12/15/95); 664 So.2d 454. For purposes of this determination, all allegations stated in the petition are accepted as true, and any doubts are resolved in favor of the sufficiency of the petition. *Weber v. State*, 93- 0062 (La.4/11/94); 635 So.2d 188.

After reviewing both petitions for damages, as did the trial court before us, we find that the allegations, when accepted as true, support a cause of action under the literal language of the Electronic Surveillance Act. See La.R.S. 15:1303(A)(4) and La.R.S. 15:1307(B). Accordingly, since we find the

petitions state a cause of action under the language of the statute, the matter is remanded to the trial court for further proceedings.

DECREE

For the foregoing reasons, the decision of the trial court sustaining Central Newspapers, Inc.'s exception of no cause of action is reversed. This matter is remanded to the Twelfth Judicial District Court for further proceedings. All costs associated with this consolidated appeal are assessed to the appellee, Central Newspapers, Inc.

REVERSED AND REMANDED.

APPENDIX F — LOUISIANA SUPREME COURT'S DENIAL OF CNI'S APPLICATION FOR WRIT OF CERTIORARI DECIDED JUNE 19, 1998

Michael J. JOHNSON
v.
Carol AYMOND, Jr., et al.
McKinley KELLER
v.
Carol AYMOND Jr., et al.

No. 98-C-1181.

Supreme Court of Louisiana.

June 19, 1998.

Prior report: La.App., 709 So.2d 1072.

In re Central Newspapers, Inc.;–Defendant(s); applying for writ of certiorari and/or review; Parish of Avoyelles, 12th Judicial District Court, Div. "B", Nos. 95-3590-B, 97-3663-B; to the Court of Appeal, Third Circuit, Nos. CA97-1466, CA97-1467.

Denied.

HTL
WFM
CDK
BJJ
CDT

CALOGERO, C.J. would grand the writ.
VICTORY, J., would grant the writ.
KNOLL, J., not on panel; recused.

APPENDIX G — RELEVANT PORTIONS OF THE LOUISIANA ELECTRONIC SURVEILLANCE ACT

§ 1303. Interception and disclosure of wire, electronic, or oral communications

A. Except as otherwise specifically provided in this Chapter, it shall be unlawful for any person to:

(1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire or oral communication;

(2) Willfully use, endeavor to use, or procure any other person to use or endeavor to use, any electronic, mechanical, or other device to intercept any oral communication when:

(a) Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(b) Such device transmits communications by radio or interferes with the transmission of such communication;

(3) Willfully disclose, or endeavor to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection; or

(4) Willfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection.

B. Any person who violates the provisions of this Section shall be fined not more than ten thousand dollars and

imprisoned for not less than two years nor more than ten years at hard labor, without benefit of probation, parole, or suspension of sentence.

C. (1) It shall not be unlawful under this Chapter for an operator of a switchboard, or any officer, employee, or agent of any communications common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication; however, such communications common carriers shall not utilize service observing or random monitoring, except for mechanical or service quality control checks.

(2) It shall not be unlawful under this Chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the commission in the enforcement of Chapter 5 of Title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(3) It shall not be unlawful under this Chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. Such a person acting under color of law is authorized to possess equipment used under such circumstances.

(4) It shall not be unlawful under this Chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the

communication or where one of the parties to the communication has given prior consent to such interception,

unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of the state or for the purpose of committing any other injurious act.

(5) It shall not be unlawful under this Chapter:

(a) For the ultimate receiver of wire or electronic communication, or an investigative or law enforcement officer to use a pen register or trap and trace device as provided in Part III of this Chapter.

(b) For a provider of electronic communication services to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, or another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful, or abusive use of such service.

(c) To use a device which captures the incoming electronic or other impulses which identify the numbers of an instrument from which a wire communication was transmitted.

(6) A person or entity providing electronic communication services to the public shall not intentionally divulge the contents of any communication while in transmission of that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient except:

(a) As otherwise authorized by federal or state law.

(b) To a person employed or authorized, or whose facilities are used, to forward such communication to its destination.

(c) Any electronic communication inadvertently obtained by the service provider and which appears to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

D. Upon receipt of the information or evidence sought by the interception, the interception shall cease.

§ 1307. Prohibition of use as evidence of intercepted wire or oral communications

A. Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this Chapter.

B. No person may broadcast, publish, disseminate, or otherwise distribute any part of the content of an electronic communication intercepted in violation of the provisions of this Chapter unless such dissemination or distribution is made to an investigator or law enforcement officer conducting an investigation into a violation of the provisions of this Section.

§ 1312. Recovery of civil damages authorized

A. Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this Chapter shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to

intercept, disclose, or use such communications, and be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of one hundred dollars a day for each day of violation or one thousand dollars, whichever is greater.

(2) A reasonable attorney's fee and other litigation costs reasonably incurred.

(3) Punitive damages.

B. A good faith reliance on a court order shall constitute a complete defense to any civil or criminal action brought under this Chapter.

APPENDIX H — REPRODUCTION OF NOVEMBER 7, 1996 ARTICLE AS PRINTED IN THE *ALEXANDRIA DAILY TOWN*

Alexandria Daily Town Talk
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THURSDAY
NOVEMBER 7, 1996

Tape allegedly implicates judge

Attorney says he has given recording of Johnson to authorities

By Steve Bannister
Staff reporter

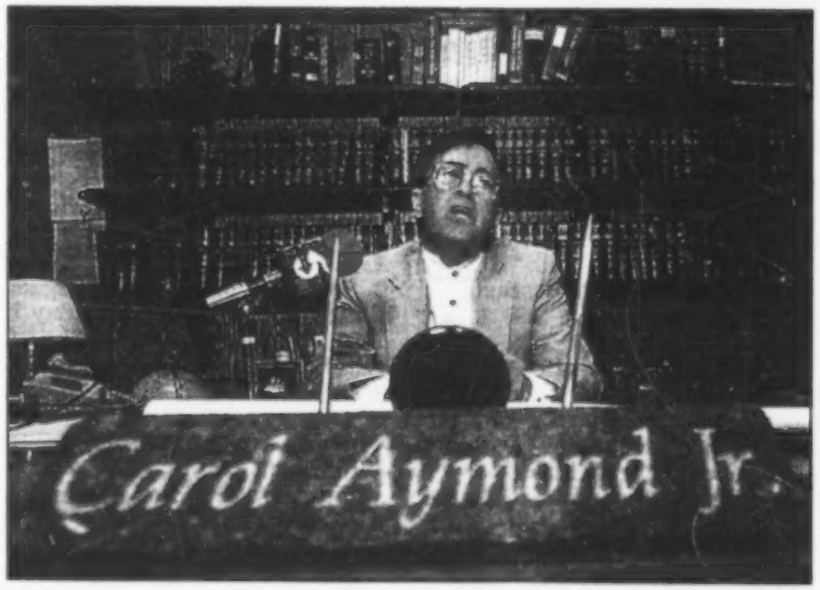
BUNKIE — Attorney Carol Aymond said Wednesday he has given federal authorities a tape-recorded conversation of 12th Judicial District Judge Mike Johnson that allegedly shows the level of corruption in Avoyelles Parish.

In the tape recording, Johnson allegedly talks about providing money to certain people on the eve of Tuesday's judicial election between attorneys Kerry Spruill and Billy Bennett, including what appears to be a reference to payments to local election officials.

In the taped conversation, which allegedly was with Avoyelles Parish Police Juror McKinley "Pop" Keller, Johnson also seems to describe his willingness to decide court cases the way Keller wants.

Johnson, who supported Spruill in the 12th Judicial District Judge Division B race, also allegedly said on the tape that he intends to punish attorney Michael Callahan for supporting Bennett.

Bennett defeated Spruill Tuesday by 56 percent to 44 percent Tuesday, according to complete but unofficial returns.



Todd Drumwright — Staff photographer

Bunkie attorney Carol Aymond Jr. holds a news conference in his office exposing an alleged tape recorded conversation between judge Mike Johnson and Avoyelles Parish police juror Pop Keller.

In a brief telephone interview Wednesday morning, Johnson said he was taped illegally and, in response to a reporter's question, said he had not engaged in vote buying.

When the reporter arrived at Johnson's office for a longer interview, he was greeted by attorney Keith Manuel, who announced he was representing Johnson and would have no comments before reviewing a transcript of the taped conversation.

Wednesday afternoon, Manuel left a brief statement through his receptionist in which he said he could not comment specifically about what was in the tape because he was still reviewing it and talking with Johnson.

But Manuel also said that "at no time has the judge ever engaged in any illegal activities or wrong doing."

Spruill, reached at home Wednesday evening, was unaware of the taped conversation. When asked about it, Spruill said he did not buy votes or authorize anyone to do that for him, saying he ran a hard, honest race and lost.

Keller said he had not heard the tape and did not remember having the conversation he is accused of having with Johnson. Keller also said he planned to hire an attorney to respond to questions.

When asked if he bought votes for Spruill, Keller answered: "I don't know anything about all this."

The questions began Wednesday morning when Aymond held a news conference in which he played the tape and passed out transcripts.

Aymond said the tape is of an Oct. 29 telephone conversation between Johnson and Keller. Aymond refused to say who recorded the conversation or how he came to possess the tape, saying that wasn't important and that the recording was made legally.

Aymond also said a few days ago that he provided the U.S. Attorney's Office with a copy of the tape. The U.S. Attorney's Office would not comment when asked about that.

The comments in the tape recording allegedly suggest, but do not prove, that Johnson and Keller were discussing buying votes for Spruill. Also, Aymond stopped short of accusing the men of that.

"It's clear to me what they're talking about but I'm not going to get into that," Aymond said.

Aymond did say that the tape proves there is corruption and a "judicial crisis" in the parish and that it's time for others to join with him in cleaning things up.

"I'll devote the rest of my life in seeing that wrongs like this are corrected," Aymond said.

Johnson won re-election in the Sept. 21 primary in a particularly

■ **Please see TAPE, D-4**

[November 7, 1996 Article - Continued]

Tape

■ Continued from D-1

bitter race in which Aymond was the only other candidate.

Aymond said Wednesday he called the news conference to let the public know what was going on in the parish and "stands to gain nothing" politically from doing that.

One of the issues in the race between Johnson and Aymond was the Louisiana Judiciary Commission's recommendation to the Louisiana Supreme Court that Johnson be removed from office for alleged ethical violations.

The Supreme Court heard the complaint last month but has not yet handed down its decision.

That issue allegedly came up in the taped conversation, with Johnson saying whatever action the Supreme Court takes will involve only his current term and not his new six-year term that begins in January.

Another part of the conversation allegedly involves a debt or bankruptcy case that involves John Small, someone Keller knows.

After Keller described the case, the following conversation allegedly ensued:

Johnson: "You tell John Small that whatever Pop Keller wants me to do, that's what's going to be done."

Keller: "Look son, I told him, I said, I can tell you this, I told John it's like this here, I said, I can just about speak for Judge Johnson and Judge Johnson can speak for Pop Keller."

Johnson: "100,000 percent."

Keller: "That what I told him, I said, I can tell you what's gone happen."

Johnson: "If that's in front of me."

Johnson then allegedly offered to sign papers in

the case over the weekend if Small's attorney would come to his office, telling Keller, "You tell them, 'Whatever Pop Keller wants is what Mike Johnson wants,' "

Later in the conversation Keller allegedly said that Callahan had sent out letters of support for Bennett in the black community.

Johnson allegedly responds: "Well, I told him after Jan. 1 he ain't got no job."

Keller and Johnson allegedly return to that topic later in the conversation, with Keller saying, "Well, chief, on Michael, we just won't do him any more favors."

To this, Johnson allegedly responds: "No, that ain't good enough Pop ... That's what we've been doing, that ain't good enough, we got to punish them."

The comments suggestive of vote buying are less specific than those about the other topics. The tape allegedly contains references to spending money and "taking care" of people, then continues with the following exchange:

"Johnson: "He's (Spruill) coming to my office tomorrow morning, I'll make sure he goes down there and sees him."

Keller: "OK, now when you're going to have the package so I can pick it up?"

Johnson: "I'm going to have it Thursday, when do you want it?"

Keller: "I uh."

Johnson: "We don't want to give it to them too soon."

Keller: "No, that's what I say. Well, if they get it up there on Saturday, that'll be a good day?"

Johnson: "I'll deliver your's Saturday."

Keller: "OK. Deliver it Saturday and I'll take care of it on Sunday or Monday."

Johnson: "Yeah, I don't want them to get it too soon."